UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JWAMIE TOMIYASU and KIYO TOMIYASU,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	No. 20175
RICHARD GOLDEN and AUDREY Y. GOLDEN,	)	
	)	
Appellees.	)	
	)	

APPELLANTS' OPENING BRIEF

HARRY E. CLAIBORNE
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Las Vegas, Nevada
ATTORNEY FOR APPELLANTS

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ATTORNEYS FOR APPELLEES

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A. JURISDICTIONAL STATEMENT

In this action the appellants (hereafter called the plaintiffs) seek a determination under the Due Process Clause of the Fourteenth Amendment to the United States Constitution that a foreclosure sale under a deed of trust, and a trustee's deed to the appellees (hereafter called the defendants) pursuant to the foreclosure sale, are null and void because the plaintiffs did not have any notice whatever that the indebtedness secured by the indebtedness was in default, or of any of the proceedings for sale. (Tr. 1-4).

The statutory basis of jurisdiction is Title 28 U.S.C. Sec. 1332, as to diversity of citizenship. Additional statutory jurisdiction arises under Title 28 U.S.C., Sec. 1331, because the matter in controversy arises under the Constitution of the United States. (Tr. 1-4).

The lower court made "Findings of Fact" numbered 1, 2 and 3, that the plaintiff Kiyo Tomiyasu is a citizen and resident of the State of New York, the plaintiff Uwamie Tomiyasu is a citizen and resident of the State of California, the defendants are citizens and residents of the State of Nevada, and the amount in controversy exceeds the sum of $10,000.00, exclusive of costs and interest. (Tr. 145-146).

The validity of the following statute in Nevada is involved:

"1. Where any transfer in trust of any estate in real property is made after March 29, 1927, to secure the performance of an obligation or the payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation, for which such transfer is security.

2. The power of sale shall not be exercised, however, until:

(a) In the case of any trust agreement coming into force on or after July 1, 1949, and before July 1, 1957, the grantor has for a period of 15 days failed to make good his deficiency in performance or payment, and, in the case of any trust agreement coming into force on or after July 1, 1957, the grantor has for a period of 35 days failed to make good his deficiency in performance or payment; and

(b) The beneficiary shall first record in the office of the recorder of the county wherein the trust property, or some part thereof, is situated a notice of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; and

(c) Not less than 3 months have elapsed after the recording of such notice.

3. The trustee, or other person authorized to make the sale under the terms of the trust deed or transfer in trust, shall, prior to the making thereof, give notice of the time and place thereof in the manner and for a time not less than that required by law for the sale or sales of real property upon execution. The sale itself may be made at the office of the trustee, if the notice so provided, whether the property so conveyed in trust is located within the same county as the office of the trustee or not.

4. Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor without equity or right of redemption."

The lower court gave a summary judgment in favor of the defendants on the ground of res judicata (Tr. 149-150) from which the plaintiffs appealed to this Honorable Court (Tr.151) and it is now vested with jurisdiction over this appeal under Rule 73, Federal Rules of Civil Procedure.

B. STATEMENT OF THE CASE

The property which is involved in this case consists of an 80-acre tract of land in Clark County, Nevada, which had belonged to the Tomiyasu family for about 46 years at the time the foreclosure sale was conducted in 1962. (Tr. 31). During this period of time the land had been developed from a barren desert to a fertile farm where the father, Bill Yonema Tomiyasu lived and where he raised a large number and variety of nursery plants. (Tr. 31). At the time of the foreclosure sale, Bill Yonema Tomiyasu was 80 years of age, helpless and undable to work. (Tr. 31).

There was an encumbrance of record against the land consisting of a first deed of trust in favor of First Western Savings & Loan Company of Nevada in the sum of $38,968.29. (Tr. 60) on which the monthly payments amounted to $709.00 (Tr. 60). The Tomiyasus had entered into twelve land sale contracts upon which a balance was due in the sum of $59,759.38, exclusive of interest, at the time of the foreclosure proceedings. (Tr. 25). Excluding the value of these land sale contracts, the market value of the land in 1962 was approximately $200,000.00. (Tr. 60).

In 1959, Bill Yonema Tomiyasu, and his daughter Uwamie Tomiyasu, and his son Kiyo Tomiyasu, each owned an undivided one-third interest in the land. (Tr. 1, 23). In that year a

second deed of trust was executed covering the land for an indebtedness which amounted to $18,024.73, at the time of the foreclosure sale. (Tr. 2). This deed of trust was executed for the sole benefit of Bill Yonema Tomiyasu, who was responsible for making the payments due on the obligation the deed of trust secured (Tr. 142). Bill Yonema executed the deed of trust on behalf of his son and daughter who are the plaintiffs here under a power of attorney (Tr. 142), and the plaintiffs did not personally participate in the negotiations leading up to this deed of trust or its execution. (Tr. 142).

Unknown to the plaintiffs, who were citizens and residents of California and New York, the father, Bill Yonema Tomiyasu, became delinquent in making the payments on both the first and the second deed of trust. (Tr. 61, 142). On October 26, 1961, the beneficiary under the second deed of trust by letter notified the trustee of the default and asked the trustee to prepare a notice of default and election to sell under the deed of trust. A copy of the bank's letter to the trustee was mailed to Bill Yonema Tomiyasu (Tr. 4). From September to November, 1961, Bill Yonema Tomiyasu was absent in Japan.(Tr. 61). The trustee recorded a notice of default and election to sell in the official records of Clark County, Nevada, at the office of the County Recorder on November 13, 1961. (Tr. 9). In February, 1962, a notice of

trustee's sale was published in a Las Vegas newspaper, and notice that the publication was running was mailed to Bill Yonema Tomiyasu, the sale being set for March 13, 1962. (Tr. 61).

About the month of September, 1962, Nanyu Tomiyasu, another son of Bill Yonema Tomiyasu, knew that his father was in financial difficulty and believed him to be of such advanced years that he could not fully understand and comprehend the financial situation that he was in or that he was in danger of losing his property. Nanyu Tomiyasu contacted the United Mortgage Company in Las Vegas, Nevada, in an effort to obtain a loan on the property sufficiently large enough to satisfy existing obligations of his father and the encumbrances against the property. He dealt with United Mortgage Company for a number of weeks. (Tr. 101).

On information from United Mortgage Company as to its progress with getting the property refinanced, the trustee postponed the foreclosure sale from the original date of March 13, 1962, (Tr. 101). During these negotiations, a representative of United Mortgage Company notified Bill Yonema Tomiyasu and the trustee that it had obtained a loan commitment and the loan would go through.(Tr. 102). Pursuant to the postponements of the sale which had been had, the sale was eventually scheduled to take place on April 23, 1962.

On April 21, 1962, two days before the date of the sale,

United Mortgage Company notified Nanyu Tomiyasu that the loan commitment had been withdrawn. (Tr. 103).

The advertised sale was postponed on seven separate occasions. Each postponement was proclaimed from the front door of the trustee's office. On none of these occasions did any bidders appear. (Tr. 62).

On April 22, 1962, the trustee went to the home of Nanyu Tomiyasu, advising the sale was to be the next morning. That afternoon, Nanyu Tomiyasu contacted his then attorney, Lester H. Berkson, and told him of the foreclosure sale scheduled for April 23, 1962. In the early morning hours of April 23rd, the two of them went to the office of the trustee where Lester Berkson requested a postponement of the sale until the next day, April 24, 1962, and the sale was postponed, at which time Lester Berkson assured Nanyu Tomiyasu that a loan from other sources could be secured by him by the next day. Then, on April 24, 1962, Lester Berkson went to the offices of the trustee and stated in the presence of Nanyu Tomiyasu, that he wanted the sale postponed for another day, that he had a loan commitment from other parties and if the loan were not consummated, he, the said Berkson, would pay the obligation himself. (Tr. 103, 104).

On April 24, 1962, an employee of the trustee contacted the defendant Richard Golden and notified that the sale would

be conducted the next day at the hour of 10:00 A.M. (Tr.105).

The defendants arrived at the trustee's office on April 25, 1962, about an hour before the sale was scheduled and waited for it. The attorney, Lester Berkson, did not appear and numerous efforts made by Nanyu Tomiyasu (the only member of the Tomiyasu family who was present at the sale) to locate him were unsuccessful. (Tr. 105).

The trustee called the sale and announced that five acres of the property had been released from the trust deed to the attorney, Lester Berkson. (Tr. 62). He then announced that he had a bid of $18,024.73 (the cash bid of the bank which was the beneficiary under the trust deed, for the amount owed to it). At this point, the defendant Audrey Y. Golden offered to bid a few cents more. The trustee invited her to increase her bid to $1.00 more, and then accepted the bid of $13,025.73, accepted the personal check of the defendants for that amount and kept the check for one day before presenting it to the bank for payment in order to give the defendant Richard Golden an opportunity to deposit sufficient funds to cover this check. (Tr. 48).

On June 14, 1962, 49 days after the sale, the complaint in the first Tomiyasu case was filed (Case No. 117703, Eighth Judicial District of the State of Nevada, in and for Clark County), and with its filing, the Tomiyasus tendered

into court the full amount of the purchase price paid by the defendants and offered to pay to them any accrued costs. (Tr. 59).

The judge who presided at the trial of the first Tomiyasu case filed a decision which characterizes Nanyu Tomiyasu's participation in these proceedings as follows:

> ". . . there is much left to the imagination in the role of Nanyu Tomiyasu. He was not a party to the transaction. It seems that the trustee knew all along that Mr. Berkson was the attorney for the mortgagors. On many occasions nothing was done without the aid or consent of Mr. Berkson. Nanyu Tomiyasu had no written authority to represent anybody and while his presence may have been given consideration, although Mr. Adams (trust officer) and Mr. Lingle (representative of the bank beneficiary under the deed of trust) may have felt they had a right to assume that they could recognize Nanyu Tomiyasu as an agent of the mortgagors, nevertheless it is not true in fact." (Tr. 49-51).

The complaint in the first Tomiyasu case set forth numerous allegations of irregularities surrounding the foreclosure proceedings. It was alleged therein that the notice of breach and election to sell under deed of trust

was not given to Kiyo and Uwamie Tomiyasu. (Tr. 26). In the papers supporting the defendants' motion for summary judgment with respect to these proceedings there appears only the following: Complaint (Tr. 21-42); Answer (Tr. 43-45); Decision of the lower court (Tr. 46-51); Judgment of the lower court (Tr. 52-56); Notice of Appeal (Tr. 57); Opinion by the Supreme Court of Nevada on appeal (Tr. 58-76), reported in Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989, Entry of Final Judgment on the Judgment Docket in the lower court (Tr. 77-78); Remittitur (Tr. 78); Order denying Petition for Rehearing (Tr. 79).

In the Decision of the lower court, it is affirmatively stated that six points were raised by the plaintiffs: (1) Gross inadequacy of price received by the trustee; (2) Failure of the trustee to sell to the highest cash bidder; (3) Improper sale of the property en masse instead of in parcels; (4) The release of five acres from the deed of trust after publication of the notice of sale; (5) Failure of the notice of sale to describe the improvements on the property, water well, buildings, plants, trees and shrubbery; and (6) Irregularities in the postponements of sale. (Tr. 46, 47). No mention is made in the decision of the lower court with respect to charge of absence of notice to Kiyo and Uwamie Tomiyasu.

The judgment for the plaintiffs in the lower court was reversed on the appeal. The only aspects of that decision pertaining to notice are the following:

> "(6) From September to November, 1961, Bill Yonema (the father) was absent in Japan and handed the management of the property over to his son Nanyu, who continued such management but kept his father fully advised. Bill Yonema knew of the delinquency, the immienence of the foreclosure, the receipt of the notices from the trustee, and they made various attempts to re-finance the loan through other sources." (Tr. 61),

and:

> "We are compelled to dispose of the various grounds on which respondents attempt to support the judgment as follows:
>
> "(1) As to the asserted deficiency in the trustee's notice of sale--this was given in strict compliance with the terms of the deed of trust and the statute." (Tr. 65).

In this case Kiyo and Uwamie Tomiyasu have challenged the validity of the foreclosure sale and deed of trust on constitutional grounds, for failure in the giving of any notice of them of the default and other proceedings.

The allegations of the present complaint relative to notice are as follows:

"V. * * * that on the 19th day of November, 1961, the First National Bank of Nevada, Reno, Nevada, did cause to be filed and recorded a notice of breach and election to sell under deed of trust, a copy of said notice being attached hereto and adopted by reference as 'Exhibit B'; that thereafter notice of trustee's sale was published on February 17, 1962 and on February 24, 1962, and on March 3, 1962 in the Las Vegas Sun newspaper.

"That said notice of breach and election to sell under said deed of trust was not served upon, or delivered, to the plaintiffs, nor was any notice of any kind or description given the plaintiffs of the notice of breach and election to sell under the deed of trust; neither did the First National Bank of Nevada at any time notify the plaintiffs, or either of them, of the default in payments due under the terms and conditions of said Promissory Note, nor in any wise advise the plaintiffs that the payments were not being kept up or made current.

"VI. That neither of the plaintiffs were at that time, or now, residents of the County of Clark, State

of Nevada, and neither of the said plaintiffs herein saw, read or had notice of the publication of the said notice of foreclosure in the Las Vegas Sun newspaper.

* * *

"XI. That the sale of said lands under the conditions as hereinabove set forth constituted, without notice, violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States." (Tr. 2, 3, 4).

The Answer filed by the defendants set forth as a separate Second Defense the pleading that "all matters now attempted to be litigated in this action have been or could have been litigated and concluded in Case No. 117703 in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, wherein Bill Yonema Tomiyasu, Kiyo Tomiyasu, Uwamie Tomiyasu and Nanyu Tomiyasu were Plaintiffs, and Richard Golden and Audrey Y. Golden were Defendants, which action was heretofore concluded by final judgment entered on February 7, 1964, by the Clerk of the above entitled Court and that the said prior judgment now constitutes res judicata to the action filed herein." (Tr. 14, 15).

The defendants moved for summary judgment under Rule 56,

Federal Rules of Civil Procedure, in their favor on the ground set forth in the aforesaid Second Defense. (Tr. 18, 19).

The plaintiffs filed a response to the motion for summary judgment (Tr. 134-136) setting forth the following:

1. That the proceedings in the case relied on as res judicata of the present issues, the opinion of the Supreme Court of the State of Nevada on an appeal in that case (Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989) and the judgment in conformity with that opinion, are based upon an arbitrary and grossly and obviously erroneous holding that due notice was given of the sale under the trust deed.

2. That the plaintiffs did not have any notice of default under the deed of trust, or of the Notice of Breach and Election to Sell under Deed of Trust, or the Notice of Sale or its publication or posting.

3. That the plaintiffs were not actual parties litigant to said former litigation.

4. That under the circumstances set forth in the present complaint and the affidavits supporting the response, it would be unjust, inequitable and unconscionable and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States to allow the defendants to retain the lands which are the subject matter of this litigation.

5. That genuine questions of material fact are raised by the response to the motion for summary judgment and supporting affidavits and by the complaint on file herein.

Two affidavits were filed in support of the said Response. The first is an affidavit of the undersigned counsel for the plaintiffs (Tr. 137-140) setting forth that the undisputed testimony in the former case shows the complete absence of the giving of any notice whatever to the plaintiffs of any default in payments due under the obligation secured by the second deed of trust, or of the notice of breach and election to sell, or of the sale itself; that the undisputed testimony in that case also shows that the purported notice of sale was not posted in accordance with the statutory requirements of the State of Nevada; that the decision of the Supreme Court of Nevada in Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989, and the judgment pursuant thereto, are based upon a holding to the effect that the trustee gave the notice required by the statute, which holding was made arbitrarily and is grossly and obviously erroneous and contrary to the undisputed testimony in the case, and such palpably erroneous determination was not the product of any laches, neglect or any omission whatever on the part of the plaintiffs; that the undisputed testimony in the former case establishes that no attempt whatever was made by the trustee or the beneficiary under the trust deed to give

actual or personal notice to the plaintiffs of any default, notice of breach and election to sell, or the sale itself, although at all times material thereto, the plaintiffs were widely acquainted in Clark County, Nevada, and the City of Las Vegas, and their whereabouts could have been readily ascertained.

The second affidavit is that of the plaintiff Uwamie Tomiyasu (Tr. 141-143) which verifies the allegations of the complaint and further states that the deed of trust which was foreclosed was executed on her behalf by Bill Yonema Tomiyasu as her Attorney in Fact, that she did not personally participate in the negotiations for the execution of the said deed of trust, or the execution thereof, which was executed for the sole benefit of Bill Yonema Tomiyasu, who was responsible for the making of any and all payments due thereunder; that she did not receive any notice whatever of any default under the deed of trust, of the recording of the Notice of Breach and Election to Sell, or of the posting of the publication of the Notice of Sale under the deed of trust, and she did not know that the payments were not being kept up under the deed of trust. She further states that she did not participate in any way in any proceedings or activities whatever regarding the trustee's sale and was unaware of the existence of such proceedings and activities, and she was neither a resident of

nor present in the State of Nevada, but was at such times a resident of and present in the State of California. She further states that she was not an actual party litigant in the former case; that at the time of the filing of the complaint in that case and at all times thereafter she was not informed about or consulted with as to the institution or the prosecution of that case and did not participate in any of the proceedings in that case either in person or by an attorney; that she was not advised of the date of the trial held therein, she did not appear at said trial, either in person or by an attorney, and she did not participate in any way throughout the entire course of the proceedings in said case, including the appeal had to the Supreme Court of the State of Nevada. She stated on information and belief that her name was nominally included as a plaintiff in the former case without notification to her thereof and without her knowledge and consent because of her ownership of an undivided one-third interest in the property, in order that the complaint of the actual party in interest in that case, Bill Yonema Tomiyasu, would not be subject to dismissal upon the ground of absence of necessary or indispensable parties plaintiff.

The lower court made a "finding of fact" that the plaintiffs in this action were plaintiffs in the earlier case No. 117703 in the Eighth Judicial District Court of the State

of Nevada, in and for the County of Clark, and that the subject matter in Case No. 117703 is the same subject matter in this action, namely: That certain real property situate in Clark County, Nevada, more particularly described in the trustee's deed dated April 27, 1962, and recorded in the office of the County Recorder of Clark County, Nevada, as document No. 288385, wherein the real property was conveyed from the trustee to the defendants. (Finding of Fact inadvertently misnumbered No. 4 appearing at Tr. 147.)

The lower court made Conclusions of Law that the issues raised by the pleadings in the above entitled action are the same issues which were litigated to a final judgment in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, that there was no genuine issue as to any material fact and that defendants were entitled to judgment as a matter of law. (Tr. 147, 148).

C. SPECIFICATION OF ERRORS.

I.

The lower court erred in granting summary judgment because a genuine issue of material fact existed as to whether or not the plaintiffs were actual participants in the first Thomiyasu case, so as to be bound by the doctrine of res judicata.

II.

The lower court erred in granting summary judgment because a genuine issue of material fact existed as to whether or not the first Tomiyasu case was decided on its merits as to the plaintiffs, so as to have the effect of res judicata.

III.

The lower court erred in granting summary judgment because the defendants did not sustain their burden of establishing that the cause of action in the first Tomiyasu case is identical with the cause of action sued on in this case.

IV.

The lower court erred in granting full faith and credit and res judicata effect to the judgment in the first Tomiyasu case because that judgment rests on a holding that the notice given by the trustee as to the default under the deed of trust, the notice of breach and election to sell under the deed of trust, and the notice of sale were given in compliance with the deed of trust and the statutes of Nevada, which holding is contrary to the uncontradicted testimony in the case and is grossly and obviously erroneous.

V.

The lower court erred in granting summary judgment

because the defendants are not entitled thereto as a matter of law, because the important constitutional issues raised in this case require determination in the light of full development of all facts, at a regular trial.

VI.

The lower court erred in making "Findings of Fact" on a genuinely disputed issue of material fact, as to whether or not the plaintiffs were actual participants in the first Tomiyasu case.

VII.

The lower court erred in failing to express some decision with respect to the contentions of the plaintiffs as to the factual and legal issues in the case.

VIII.

The lower court erred in granting summary judgment against the plaintiffs when the proofs relied on by the defendants were not sufficient to establish that there were no genuinely disputed issues of material fact and that they were entitled to summary judgment as a matter of law.

D. ARGUMENT OF THE CASE

SUMMARY

The plaintiffs have invoked the jurisdiction of the federal court under Title 28 U.S.C., Secs. 1331 and 1332

raising the constitutional issue that a foreclosure sale under a deed of trust was conducted without notice to them in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The defendants moved for and were granted a summary judgment on the basis of res judicata.

On this appeal the plaintiffs challenge the lawfulness of that summary judgment on both substantive and procedureal bases.

The plaintiffs brought an action in the State of Nevada against the present defendants and the persons who participated in the negotiations and transactions leading up to the sale of the encumbered lands. This litigation is adverted to in the papers supporting the defendants' motion for summary judgment at pages 96 - 131 of the transcript of record. A summary judgment in that case was affirmed on appeal by a majority of the court. The Honorable John E. Gabrielli, District Judge, designated to sit in the place of Judge McNamee, dissented, and his expression as to the meritoriousness of the plaintiffs' contentions is applicable to the present case:

> "The conscience of this writer is shocked that in this age, an 82 year old Japanese resident of this State since 1916, and his family can be treated with such injustice and be deprived of their real property

unquestionably valued in excess of $200,000.00 (excluding the value of the land sales contracts, upon which there is a balance due Plaintiffs in the sum of $59,749.38 not including interest, which payments have been demanded by Defendants) by foreclosure of Second Trust Deed for the sum of $18,025.73 subject to a First Trust Deed of $38,968.29 which according to the present complaint was accomplished by means of an alleged conspiracy to defraud and deprive Plaintiffs of the aforesaid property by Defendants -- some of whom were in a fiduciary relationship with Plaintiffs and others were supposed to be protecting their interests throughout said proceedings. Full tender of the amount due plus costs was made to the purchasers within a reasonable time after the foreclosure sale which was rejected. This case crys out for relief, a meaningful day in Court and justice according to well established rules of law. This Court in Moore v. Prindle (July, 1964) 80 Nev. 369, 394 P.2d 352, a case involving forefeiture under a contract of sale, reversed the lower Court's declaration of forfeiture and in doing so stated, 'Moore tendered the amount necessary to cure the default within a reasonable time. As was said in the case

of Mosso v. Lee, 53 Nev. 176, 295 P. 776,

' * * * there can be no doubt in this age, even where time is of the essence of a contract to convey real estate, coupled with a provision of forfeiture, but that a court of equity will grant relief from a default and a declaration of forfeiture if the condition be subsequently performed, or tendered, without unreasonable delay, where no circumstances have intervened that would render it unjust or inequitable to give such relief.' This language is fully applicable in all respects to the instant case."

An application for review on writ of certiorari of the decision in that case is presently pending before the Supreme Court of the United States.

The controversy which is the subject of this action also "crys out for relief, a meaningful day in Court and justice according to well established rules of law." (Tomiyasu v. Golden, Nev. 1965, 400 P.2d, 415, 419).

POINT ONE: DUE PROCESS OF LAW REQUIRES NOTICE BEFORE PROPERTY INTERESTS CAN BE DISTURBED OR FORFEITURE EXACTED.

The plaintiffs had no notice of the default or any of the further proceedings by which their interest in the property which is the subject of this litigation was foreclosed. (This fact is set forth in the verified complaint and the affidavits filed in resistance to the defendants' motion for summary judgment, and must be accepted as true in passing upon whether or not the defendants are entitled to a summary judgment under Rule 56, Federal Rules of Civil Procedure.)

The matters relied on by the defendants to support their motion for summary judgment do not establish that the constitutional claim of the plaintiffs was litigated in the first Tomiyasu case, but show, on the contrary, that the same was not litigated therein.

The following cases are the law of the land respecting the constitutional requirement that no person shall be stripped of his property without notice:

Schroeder v. New York, 1962, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279, 89 A.L.R.2d 1398; Lambert v. People of the State of California, 1957, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228; Walker v. City of Hutchison, 1956, 352 U.S. 112, 77 S.Ct. 200, 12 L.Ed.2d 178; Covey v. Town of Somers, 1956, 351 U.S. 141

76 S.Ct. 724, 100 L.Ed. 1021; Mullane v. Central Hanover Bank & Trust Co., 1950, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; Griffin v. Griffin, 1946, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635.

In Schroeder, it was held that newspaper publications and posted notices, as provided for under the New York City Water Supply Act were not sufficient notice under the requirements of the Due Process Clause to support condemnation proceedings affecting property on the Neversink River in Orange County, New York, which the owner and her family occupied only during the months of July and August each year. That case reviews the constitutional principal and cases decided under it:

> "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v Meyer, 311 U.S. 457; Grannis v.Ordean, 234 U.S. 385; Priest v. Las Vegas, 232 U.S. 604; Roller v. Holly, 176 U.S. 398.' Mullane v Central Hanover Bank & Trust Co. 339 US 306, 314, 94 L ed 865, 873, 70 S Ct 652."
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> * * * * * * * * *
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> "As was emphasized in Mullane, the requirement

that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process--the right to be heard. 'This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.' 339 US at 314, 94 L ed at 873, 70 S Ct 652. The Court recognized the practical impossibility of giving personal notice in some cases, such as those involving missing or unknown persons. But the inadequacies of 'notice' by publication were described in words that bear repeating here:

'Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.' 339 US, at 315, 94 L ed at 874, 70 S Ct 652.

"The general rule that emerges from the Mullane Case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. 'Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.' 339 US, at 318, 94 L ed at 875, 70 S Ct 652.

"This rule was applied in New York v New York, N.H. & H.R. Co. 344 US 293, 296, 97 L ed 333, 336, 73 S Ct 299, where the Court pointed out that '(n)otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and that '(i)ts justification is difficult at best.' The rule was applied again in Walker v Hutchinson City, 352 US 112, 1 L ed 2d 178, 77 S Ct 200, in a factual situation much akin to that in the present case. In Walker part of the appellant's land had been taken in condemnation proceedings, and he had been given 'notice' of a proceeding to fix his compensation only by publication in the official city newspaper. The Court held that such notice was constitutionally

insufficient, noting that the appellant's name 'was known to the city and was on the official records,' and that '(e)ven a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.' 352 US, at 116, 1 L ed 2d at p 182, 77 S Ct 200."

In Lambert, it was set forth: "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed."

In Walker, the rule was applied: ". . . if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."

In Mullane, the Court said: ". . . When notice is a person's due, process which is a mere gesture is not process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

In Griffin, the Court held a judgment obtained without procedureal due process is not entitled to full faith and credit when sued on in another jurisdiction.

The plaintiffs are before this court attacking the proceedings by which the defendants obtained the trust deed because of a total absence of notice to them that their pro-

perty interests were called up to be forfeited. Of course, these were not judicial proceedings, but they were done pursuant to the authority to sell conferred by statute, and the requirements of due process apply to such proceedings with the same force and effect as to a state acting through a judicial tribunal.

Under the law of the land, the acts of the beneficiary under the trust deed and the trustee, and Nevada Revised Statutes, Sec. 107.080, did not constitute and do not provide for the effective notice which is required under the Due Process Clause.

POINT TWO: THE VALIDITY OF A DEFENSE OF RES JUDICATA MUST BE DETERMINED BY FEDERAL LAW AND UNDER FEDERAL LAW, DISPOSAL OF IMPORTANT CONSTITUTIONAL ISSUES BY WAY OF SUMMARY JUDGMENT IS NOT APPROVED.

The constitutional claim made by the plaintiffs was not in issue and was not decided in the first Tomiyasu case. The plaintiffs were not required to make that claim in the state court. They are authorized to make it here, and whether or not the defense of res judicata is valid must be determined under federal-judicially declared law.

These principles are set forth in the case of Howard v. Ladner, D.C. Miss., 1953, 116 F.Supp. 783.

In that case the plaintiffs brought a federal action to enjoin state officials from enforcing a state statute regarding registration of the name of a political party on the ground the statute, as construed, constituted a denial of due process. The controversy had been before the courts of Mississippi, and an adverse decision was offered as res judicata on a motion for summary judgment. The plaintiffs had sought review of the Mississippi decision on writ of certiorari in the United States Supreme Court, but their petition was denied because it was not timely filed.

It was urged that the plaintiffs had a right to direct appeal to the United States Supreme Court from the Mississippi decision and that they were thereby precluded from raising the federal constitutional question. Of this the court said:

> "The United States Courts are the peculiar guardians of the Constitution of the United States. The decisions of even the highest state courts are not binding upon federal courts concerning questions arising under the Constitution of the United States. If we were concerned simply with an application of the doctrine of stare decisis, it would be clear that we are not bound by the opinion of the Supreme Court of Mississippi. When

all that is involved is the decision of a pure question of law, it seems doubtful whether a different result should follow because we call the doctrine res judicata rather than stare decisis."

In considering whether the causes of action were the same in the two cases, the court said:

"What the Mississippi Circuit Judge said as to the constitutionality of the statute was in connection with its construction. The primary objective of the action in the state court was to secure a proper construction of the statute, the plaintiffs contending that the statute must be construed to afford them relief in order to sustain its constitutionality. The judgment of the Supreme Court of Mississippi does not mention the constitutionality of the statute. Its opinion in that respect may be referred to the statute's construction by way of showing that the Circuit Judge was in error in holding that he must construe the statute as he did in order to sustain its constitutionality. The claim adjudged was the right to relief under the Mississippi statute, the exclusive right to the use of the name 'Republican'. The claim now sought to be enforced is the right to relief against or despite the Mississippi statute, the right to the use by the plaintiffs, not

exclusive of the defendants, of the name 'Republican'. The plaintiffs argue that they are not foreclosed from struggling for co-existence, because they have been beaten in a war of extermination.

(12, 13) From the viewpoint of trial convenience, we may observe that an authoritative construction of the statute by the State Supreme Court was necessary before this Court could proceed with a suit to enjoin its enforcement and execution as violative of the Constitution of the United States. 28 U.S.C.A. Sec. 2284(5). Shipman v. DuPre, 339 U.S. 321, 70 S.Ct. 640, 94 L.Ed.877. The federal courts will not assume, in advance of decision by the state court of last resort, that that court will place such a construction upon a statute as will render it obnoxious to the federal Constitution. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 186, 52 S.Ct. 548, 76 L.Ed. 1038; Arizona Copper Co. v. Hammer, 250 U.S. 400, 430, 39 S.Ct. 553, 63 L.Ed. 1058; Pelton v. Commercial National Bank, 101 U.S. 143, 25 L.Ed. 901. It is natural, therefore, and even necessary for plaintiffs to proceed first in the state courts to secure a construction of the statute."

In considering the defense of res judicata, the court pointed out that since the case raised an issue under the

onstitution of the United States that the validity of the efense of res judicata was to be determined according to ederal-judicially declared law. It noted an article in 5 Harvard Law Review, pp. 818, 824, entitled, "Developments n the Law of Res Judicate," which examined the policy con- iderations applied by the courts in passing on the defense, rial convenience, stability, countervailing policies, and ffect of waiver, fraud and mistake on merger. In speaking f countervailing policies, the court stated:

"(17) (f) Countervailing Policies. We have discussed a number of the factors entering into the application of the doctrine of res judicata which give cause to its application in the present case. We prefer, however, to base our decision upon considerations of public policy to which the doctrine of res judicata should yield. As was stated by Judge Hutcheson in Holmes v. Donald, 5 Cir., 84 F.2d 188, 190, 'It (res judicata) is not a Procrustean formula to be rigorously and rigidly applied, to give substance to what was merely an appearance of finality, and thus cut off actions and defenses not really, but only apparently, determined.' Mr. Justice Rutledge in his dissenting opinion in Angel v. Bullington, supra, 330 U.S. at page 203, 67 S.Ct. at page 668, made, it seems to us,

a sound observation, not in conflict with the opinion of the Court in that case, to the effect that it is not every case 'in which the policy of stopping litigation outweighs that of showing the truth.' In Mercoid Corporation v. Mid-Continent Co., supra, 320 U.S. at page 670, 64 S.Ct. at page 273, Mr. Justice Douglas, speaking for the Court, said:

'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' Virginian Ry. Co. v. System Federation, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789. 'Where an important public interest would be prejudiced,' the reasons for denying injunctive relief 'may be compelling.' City of Harrisonville v. W. S. Dickey Clay Co., 289 U.S. 334, 338, 53 S.Ct. 602, 603, 77 L.Ed. 1208. And see United States v. Morgan, 307 U.S. 183, 194, 59 S.Ct. 795, 801, 83 L.Ed. 1211. * * * That principle is controlling here. The parties cannot foreclose the courts from the exercise of that discretion by the failure to interpose the same defense in an earlier litigation. Cf. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 63 S.Ct. 172 (87 L.Ed. 165)."

The summary judgment was denied in this language:

". . . A right decision as to the constitutionality of the statute, subject to effective review by the Supreme Court of the United States, is of so much public importance that, in our opinion, it supersedes the rule of res judicata. The motions of the defendants for summary judgment are therefore denied."

It has often been recognized that a court of equity can grant relief in an independent action brought to set aside a judgment for fraud, mistake or lack of jurisdiction. See, for example, Sayers v. Burkhardt, CA 4th, 85 F. 246, cert. den., 172 U.S. 649, 19 S.Ct. 886, 43 L.Ed. 1183. Similarly, equity exercises a like jurisdiction to prevent unconscionable retention or enforcement of a judgment at law procured by fraud or mistake. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250; Dolcater v. Manufacturers & Traders Trust Co., D.C., N.Y., 1938, 25 F. Supp. 637.

There is also a doctrine that when a judgment is arbitrary and grossly and obviously erroneous, such error may constitute a denial of due process of law, and such judgment be no more effective to conclude the rights of a party than one procured by fraud. The doctrine was announced, although not applicable to the particular judgment in question there, in the

case of Roberts v. City of New York, 1935, 295 U.S. 264, 79 L.Ed. 1429, 55 S.Ct. 689:

"Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 63, 70, 55 S.Ct. 316, 79 L.Ed. 761. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action. The test has been differently phased by different judges and in different contexts. At times we find the statement that the Constitution is not infringed unless there has been 'absolute disregard' of the right of the owner to be paid for what is taken. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 246, 17 S.Ct. 581, 41 L.Ed. 979; Backus v. Fort Street Union Depot Co., 169 U.S. 557, 565, 18 S.Ct. 445, 42 L.Ed. 853; Appleby v. Buffalo, 221 U.S. 524, 532, 31 S.Ct. 699, 55 L.Ed. 838. At other times we are told that due process is not lacking unless 'plain rights' have been ignored, with a reminder that much will be overlooked

when there is nothing of unfairness or partiality in the course of the proceedings. McGovern v. City of New York, supra, 229 U.S. 363, at page 373, 33 S.Ct. 876, 57 L.Ed. 1228, 46 L.R.A. (N.S.) 391. From the very nature of the problem these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differences or degree too subtle to be catalogued. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828, 14 Ann. Cas. 560; Klein v. Board of Supervisors, 282 U.S. 19, 23, 51 S.Ct. 15, 75 L.Ed. 140, 73 A.L.R. 679. Cf. Davidson v. New Orleans, 96 U.S. 97, 104, 24 L.Ed. 616. One cannot hope to mark its bearings in a sentence or a paragraph."

It is respectfully submitted that if the decision of the trial court in the first Tomiyasu case (Tr. 46-51) is lined up beside the opinion of the Supreme Court of Nevada in that case (Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989, Tr. 59-76) the quality and extent of the errors made is inescapably apparent. With specific reference to the question of notice, it is patently obvious that no notice was ever given by the beneficiary or the trustee to Kiyo and Uwamie Tomiyasu as to the default, the notice of breach and election to sell, and the

notice of sale, and that notices were not even posted in accordance with the requirements of the trust deed and Covenant No. 6 of Nevada Revised Statutes, Sec. 107.030, in that it is required that posting be made in three public places of the township where the property is situated and also where the property is sold. In this case the lands were located in Township 22 South, of Ranges 61 and 62 East, Clark County, of which no part of the property is located in the City of Las Vegas where the sale was held. The undisputed evidence in the case shows that two notices were posted in the City of Las Vegas (one at the Clark County Court House and one at the City Hall of the City of Las Vegas) and that one notice was posted in Township 22 on a tree near a shack on the lands involved in this case and that no other notices whatever were posted at any locations. (The foregoing matters are set forth in the Affidavit in Resistance to Defendants' Motion for Summary Judgment of the undersigned, Tr. 137-140). The decision of the Nevada Supreme Court is based upon a holding to the effect that the trustee gave the notice required by the statuted, which holding is arbitrary and wholly contrary to the undisputed testimony in the case, and that holding was not the product of any laches, neglect or omission whatever on the part of the plaintiffs. Such a decision is itself violative of the requirements of due process and is not entitled to full faith

and credit or to stand as res judicata.

At the time the case of Howard v. Ladner supra was decided, the decision in Angel v. Bullington, 330 U.S. 183, 91 L.Ed. 832, 67 S.Ct. 657 was in effect that where a federal district court is sitting in a civil case on diversity of citizenship, it sits simply as another court of the state, and for failure of the plaintiff to take an appeal to the Supreme Court of the United States on federal issues involved in the state court decision, he was foreclosed under the doctrine of res judicata from bringing a proceeding in federal district court.

The court in Howard v. Ladner held it was not limited by this restriction since that was not a diversity of citizenship case alone, but one which raised constitutional questions. That is also true of the present case, but the rule of Angel v. Bullington is in effect overruled under the recent decision of Donovan v. City of Dallas, 1964, 377 U.S. 408, 12 L.Ed.2d 409, 84 S.Ct. 1579, holding that the question whether a plea of res judicata would be good in a federal action brought by plaintiffs who had been unsuccessful in similar state court action was for federal courts.

As is brought out in the statement of the case, and will be argued hereafter, under later points, there are substantial questions of disputed fact in this case which preclude decision

by summary judgment, but even if that were not so, the nature of the case and the importance of the constitutional issues raised by it are such that disposition by summary judgment is erroneous. Kennedy v. Silas Mason Co., 1948, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347; Pacific American Fisheries v. Mullaney, CA 9th, 1951, 191 F.2d 137. These cases are illustrative of the rule that before a district court can enter a summary judgment it must determine both (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law, under Rule 56 (c), Federal Rules of Civil Procedure. A finding that there are no genuine issues of fact does not automatically establish that the moving party is entitled to a judgment as a matter of law. Shahid v. Gulf Power Company, CA 5th, 1961, 291 F.2d 422.

POINT THREE: TO BE RES JUDICATA, THE FORMER CASE MUST HAVE BEEN ON THE SAME CAUSE OF ACTION, BETWEEN THE SAME PARTIES, AND DECIDED ON THE MERITS.

Under the preceding point, it has been shown that in the first Tomiyasu case no constitutional issues were raised or determined. Under the rule of the authorities therein cited, the present case is not on the same cause of action as the

first one.

As has been shown under the Statement of the Case, there was a bare allegation that the plaintiffs did not have notice of the breach and election to sell was not made the basis of any constitutional claim in the case, and it was not the subject of comment or holding by the trial judge in his Decision or in the Opinion of the Supreme Court of Nevada.

The affidavit of Uwamie Tomiyasu (Tr. 141-143) states that she was not an actual party litigant in the first Tomiyasu case; that she was not informed about or consulted with as to the institution or prosecution of the case and did not participate in any of the proceedings therein, either in person or by an attorney, and that she did not participate in any way throughout the entire course of the proceedings including the appeal to the Nevada Supreme Court; that the inclusion of her name as a party plaintiff was without obtaining her consent, without notification to her and without her knowledge.

The defendants have contended before the lower court that the plaintiffs are estopped to deny that they were parties to the first Tomiyasu case. (See Reply Memorandum of Points and Authorities in Support of Motion for Summary Judgment, erroneously omitted from the original transcript and the original of which has been separately forwarded to the court).

The argument of the defendants was (1) that there is

inconsistence between the affidavits of Uwamie Tomiyasu (Tr. 137-140) and that of the undersigned (Tr. 141-144) in resistance to the motion for summary judgment; (2) that such contention was not raised in another case (No. A8739, Eighth Judicial District Court, State of Nevada) where the defendants also asserted the bar of res judicate; and (3) that by virtue of the power of attorney given to Bill Tomiyasu he had complete authority to institute a suit in her name to set aside the foreclosure sale.

Certainly any issue of estoppel is a question of fact, and defendants seem to so recognize, since it is only with respect to the power of attorney that they have urged estoppel "as a matter of law." But it is hornbook law that a power of attorney is not self-executing and intention to exercise the power will never be presumed. 41 Am. Jur. "Powers" Secs. 45, 46. These factual questions are in dispute and cannot be determined on a motion for summary judgment.

Such a question arose in the case of Perrera v. Smolowitz, D.C., N.Y., 1952, 12 F.R.D. 444, 17 F.R.Serv. 56c433, Case 1. There the court took notice of a situation in which the former litigation in a negligence action had been conducted by insurance attorneys, and in another action arising out of the same transaction the court refused to give a partial summary judgment saying the entire subject of the participation of the named

parties to the suit would have to be laid bare at a regular trial of the case. The court said:

"... it is an established principle that where an essential question of fact is actually litigated in one action and determined therein, that determination is conclusive between the parties in any subsequent action wherein the same factual issue arises.

"The difficulty of the present situation is that if the defendant Harry Smolowitz' affidavit is true, there was no actual litigation, and as to that the testimony of all parties, ostensible and actual, ought to be taken before it can become possible to know in any true sense whether the doctrine of collateral estoppel is involved.

"It is concluded that the interests of justice require that the defendants be given their day in court to demonstrate, if they can, that they should not be subjected to the rigors of res judicata unless and until it is clearly demonstrated that their rights to litigate in this case the question of negligence and their own counterclaim, have indeed been foreclosed."

To the same effect is Gonzales v. Tuttman, D.C., N.Y., 1945, 59 F.Supp. 858, where the plaintiff sought to recover on judgments rendered by the District Court of Puerto Rico.

The judgment purported to run against the individual defendants as well as the corporate defendant. The individual defendants obtained an ex parte order vacating the judgment to them on the ground they neither appeared nor were served. The plaintiff argued that the individual defendants waived service because of the appearance of their attorneys in the case and that since she had no notice of the ex parte order that it was null and void. The court said:

". . . It is well settled that the jurisdiction of any court exercising authority over a subject may be enquired into in every other court when the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceeding. Williamson et al. v. Berry, 49 U.S. 495, 8 How. 495, 12 L.Ed. 1170; Thompson v. Whitman, 85 U.S. 457, 18 Wall. 457, 21 L.Ed. 897; Kilbourn v. Thompson, 103 U.S. 168, 197, 198, 26 L.Ed. 377; Guarantee Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U.S. 137, 147, 11 S.Ct. 512, 35 L.Ed. 116; Simon v. Southern Railway Co., 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492; Adam v. Saenger, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649; Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85.

"In the absence of essential facts concerning

jurisdiction over the persons against whom the said judgments purport to run, the motion for summary judgment as to the Second cause of action must accordingly be denied."

POINT FOUR: ON THE HEARING OF A MOTION FOR SUMMARY JUDGMENT UNDER RULE 56c, FEDERAL RULES OF CIVIL PROCEDURE, THE COURT HAS NO AUTHORITY TO DETERMINE ISSUES OF FACT.

The lower court made no expression at all about the contentions raised by the plaintiffs in resistance to the motion for summary judgment. It did make "Findings of Fact" and "Conclusions of Law." (Tr. 145).

In the case of Trowler v. Phillips, CA 9th, 1958, 260 F.2d 924, this Honorable Court stated:

"It is interesting to note that findings of fact and conclusions of law were prepared and signed. The theory of a summary judgment is that there are no disputed facts. We have seen findings of fact accompanying summary judgments, Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., which, while unnecessary, did provide a handy summary. But all too often a set of unnecessary findings of fact is the

tell-tale flag that points the way to a discovery that summary judgment should not have been granted."

In the case of Steiner v. Wertheimer, CA 6th, 1957, 250 F.2d 575, a summary judgment was reversed where the lower court did not make any explanatory opinion showing why in its opinion the numerous factual issues raised by the pleadings, involving two different legal theories in support of the relief sought, were not genuine issues. The Court said:

"The Court is of the opinion that the record in its present shape does not present the solid basis of findings based on litigation or uncontradicted facts or the views of the District Judge with respect to the legal issues involved, that should precede our review of the judgment rendered in this case. The factual situation should be fully developed through the usual trial procedure in the District Court, instead of summary judgment proceedings. Kennedy v. Silas Mason Co., 334 U.S. 249, 256-257, 68 S.Ct. 1031, 92 L.Ed. 1347; Stevens v. Howard D. Johnson Co., 4 Cir., 181 F.2d 390, 394; Estepp v. Norfolk & Western Railway Co., 6 Cir., 192 F.2d 889; Hoy v. Progress Pattern Co., 6 Cir., 217 F.2d 701, 704."

Respectfully submitted,

s/ Harry E. Claiborne

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

S/ Harry E. Claiborne

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PROOF OF SERVICE

RECEIPT OF THREE COPIES of the foregoing Opening Brief of Appellants is hereby acknowledged this 20th day of August, 1965.

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